



temporary partial disability compensation or reimbursement from the Workers Compensation Fund (Fund) for overpayment of temporary partial disability benefits; (3) whether the respondent is entitled to a credit for a missed doctor's appointment; and, (4) claimant's entitlement to future medical treatment.

Claimant argues the ALJ's Award addressed the issues raised by respondent and should be affirmed.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant, a dental assistant for respondent, was stuck in the palm of her left hand on February 8, 1999, by a needle that had just been used on an HIV positive patient. Claimant immediately rinsed the wound with alcohol and hydrogen peroxide. She went to Dr. Clifton Jones and began treatment within three hours of the incident. Because the patient was a high load AIDS patient, the doctor recommended claimant undergo the AIDS cocktail therapy which consisted of claimant taking mass antiviral medication. Claimant had to take 10 pills a day for 30 days which made her sick.

There was no guarantee the medication would prevent claimant from becoming HIV positive. Initially claimant was tested for HIV every week, then every two weeks, then once a month, then every six months and finally once a year. The tests have all been negative.

Although psychological counseling was initially offered, the claimant continued working and because the doctor she worked for indicated he would be supportive she thought she could handle the stress of wondering whether she would become infected. After the needle stick incident, claimant mainly performed duties cleaning trays and washing scrubs.

Claimant continued working for respondent until July 29, 1999, when she was terminated by respondent for unknown reasons. Claimant's termination of employment on July 29, 1999, came as a complete surprise to claimant. On that day, claimant went to lunch and, upon returning from lunch, found a handwritten note from Richard T. Darnall, D.D.S., stating that he was "sorry things didn't work out as well as both of us had hoped." Claimant's final paycheck was attached. Dr. Darnall wished claimant well in the future. Claimant attempted to talk to Dr. Darnall about the termination, but was not allowed to visit with the doctor. Up to that point in her employment, claimant was unaware of any dissatisfaction with her job performance.

When claimant began seeking other employment as a dental assistant, she encountered substantial difficulties. Claimant opined the rumor about her exposure to the AIDS virus had circulated through the dental community. This, coupled with the uncertainty in claimant's life as to whether she was infected with HIV or would develop full blown AIDS, caused problems in claimant's marriage and placed claimant under substantial psychological stress.

For the next several months, claimant attempted to find work as a dental assistant in the Topeka area, but was unable to do so. Finally, on November 1, 1999, claimant began working at Dillard's department store, earning \$315 per week, which is less than the \$375 to \$400 per week claimant had averaged with respondent.

During the period August 15, 1999, through November 1, 1999, claimant received unemployment benefits in the amount of \$217 per week. When claimant began working at Dillard's, the unemployment benefits stopped.

Claimant was referred by her attorney to Dr. James R. Eyman, a licensed psychologist, for an evaluation. Dr. Eyman, who examined claimant on August 31, 1999, and October 13, 1999, recommended that claimant be placed on antidepressant medication and undergo individual psychotherapy to help address her increasing depression.

Following a preliminary hearing, the ALJ ordered treatment with Dr. Eyman. Dr. Eyman provided psychological counseling as well as antidepressant medication. The doctor provided psychotherapy sessions until he released claimant on September 12, 2001. But claimant was continued on her antidepressant medication. The last time Dr. Eyman saw claimant he noted:

. . . she was still having some sleep difficulties because she was worrying at times about having AIDS and with the concentration there were times that her concentration was impaired because she would become preoccupied with thinking about the needle stick and the possibility that she still might have AIDS. The last time that I saw her she continued to not let family members drink after her. She was worried about if she would cut herself that one of the family members would touch the blood and somehow become contaminated. And I believe, if I remember correctly, that she and her husband were still using condoms for protection.<sup>1</sup>

Dr. Eyman concluded that claimant's fears of contracting the HIV virus resulted in a decline in claimant's ability to cope with activities of daily living as well as a loss of concentration. Consequently, the doctor opined that as a result of the needle stick incident

---

<sup>1</sup> Eyman Depo. at 13-14.

claimant suffered a 24 percent permanent partial functional impairment. The doctor further noted that if he factored into the impairment the claimant's feelings of anger over her termination, the rating would have been higher.

The respondent referred claimant to Dr. Patrick L. Hughes for examination and evaluation. Dr. Hughes concluded that after the needle stick incident claimant had an anxiety disorder but that once claimant reached past the one year barrier for developing HIV, that it was not reasonable for her to continue to have psychological symptoms. Moreover, the doctor noted it would be irrational for claimant to think that she might still be positive some day. Dr. Hughes noted that if a patient came to him with an irrational fear, he would not treat them for it other than to tell them there is nothing that can be done except to face the fact. The doctor concluded claimant was trying to get even for being terminated and she had no psychological disability as a result of the needle stick incident.

Claimant testified that her doctor had recommended she annually test for HIV for at least five years.

Respondent argues that Dr. Hughes' testimony is the most persuasive and accordingly, claimant has failed to establish she suffered any permanent impairment as a result of the work-related incident.

Dr. Hughes met with claimant on one occasion for about 45 minutes. Because claimant had tested negative a year after the needle stick incident he concluded it was irrational for her to still harbor concerns that she might test positive in the future. The doctor concluded it was no longer possible for claimant to test positive as a result of that incident even though he admitted he had no expertise in infectious diseases. And he noted he would not treat someone with an irrational fear. It seems inconsistent to conclude someone has no psychological condition because of an unreasonable or irrational fear. Such a fear would appear to be exactly the type of condition that psychological or psychiatric treatment would aid. The ALJ concluded, and the Board agrees, that Dr. Eyman's opinion was more persuasive. The ALJ's determination claimant suffers a 24 percent functional impairment is affirmed.

Respondent next argues it is entitled to a credit for the payment of temporary partial disability benefits in the sum of \$7,335.67, because claimant had returned to work without restrictions after she was terminated from her job. Respondent, in its brief, further argues that claimant's loss of her job was unrelated to the needle stick incident and consequently there would be no nexus between her wage loss and her work-related injury. Respondent concludes claimant was not entitled to temporary partial disability compensation.

The claimant testified she was never given a reason for her termination. Respondent never proffered any evidence on this issue. Although there is some

speculation by claimant that perhaps it was related to an incident with a patient on the day she received her termination, nonetheless, there is no other evidence in the record to establish the cause for her termination. It is disingenuous for respondent to argue claimant was terminated for cause based upon claimant's speculation regarding possible reasons for her own termination, when none was given by respondent.

The Workers Compensation Act (Act) provides that temporary partial general disability benefits are paid at two-thirds of the difference between the pre-injury average weekly wage and the amount actually earned after the accident. K.S.A. 1998 Supp. 44-510e(a) provides, in part:

. . . Weekly compensation for temporary partial general disability shall be  $66\frac{2}{3}\%$  of the difference between the average gross weekly wage that the employee was earning prior to such injury as provided in the workers compensation act and the amount the employee is actually earning after such injury in any type of employment, except that in no case shall such weekly compensation exceed the maximum as provided for in K.S.A. 44-510c and amendments thereto.

The Act does not specifically define when temporary partial disability exists. But K.S.A. 1998 Supp. 44-510e(a) does define permanent partial disability as being "disabled in a manner which is partial in character and permanent in quality." Therefore, by implication, temporary partial disability exists when a worker is disabled in a manner which is partial in character and temporary in quality.

Claimant was temporarily and partially disabled as she was able to perform some substantial and gainful employment but she had not reached maximum medical recovery. Accordingly, claimant is entitled to receive temporary partial disability benefits for the periods in question in the sum of \$7,335.67.

Like temporary total disability compensation, temporary partial disability compensation is intended solely as wage replacement. In this respect, temporary partial disability compensation is akin to temporary total disability compensation, as opposed to permanent partial disability compensation. The calculation for temporary total disability compensation is, likewise, tied to the average gross weekly wage that the employee was earning prior to his injury. K.S.A. 44-510c(b)(1) provides:

Where temporary total disability results from the injury . . . . [W]eekly payments shall be made during such temporary total disability, in a sum equal to  $66\frac{2}{3}\%$  of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto . . . .

Further evidence that temporary partial disability is treated the same as, and is considered a form of, temporary total disability is contained within the provisions of K.S.A. 1998 Supp. 44-510e(a)(2). This provision provides for the calculation of the number of weeks payable for permanent partial disability compensation by subtracting from the 415 weeks the total number of weeks that temporary total disability compensation was paid. This provision has, likewise, been held applicable to temporary partial disability compensation. In other words, the equivalent weeks of temporary total disability compensation are subtracted from the 415 weeks to find the total number of weeks available for an award of permanent partial general disability.

Although the Act limits the number of weeks that temporary partial and permanent partial disability benefits may be paid, it is silent in the method and manner that temporary partial is to be considered for purposes of computing an award. In this proceeding, the respondent and insurer have paid claimant a total of \$7,335.67. Because this sum cannot be utilized in the mathematical formula for computing an award, it must be converted to weeks. The Board finds that the proper method to convert the temporary partial paid into a weekly equivalent is to divide the total sum paid, or \$7,335.67, by the weekly temporary total disability benefit rate, or \$318.<sup>2</sup> Using this method, the weekly equivalent of the temporary partial disability benefits paid in this proceeding is 23.07 weeks.<sup>3</sup> The respondent is entitled to a credit for the 23.07 weeks paid in the calculation of the final award.

The ALJ's Award correctly provided respondent a credit for the payment of temporary partial disability benefits in the calculation of the award, however, the ALJ's calculation contained some mathematical errors.

Initially, a payment rate must be determined, which in this case is calculated by multiplying the stipulated \$476.98 average gross weekly wage by .6667.<sup>4</sup> Such calculation computes to an amount less than the maximum provided by K.S.A. 1998 Supp. 44-510c and therefore results in the payment rate of \$318.

The next step is to determine the number of disability weeks payable by subtracting from 415 weeks the total number of weeks temporary total disability compensation was

---

<sup>2</sup> The ALJ's Award utilized an incorrect payment rate of \$318.15 rather than the appropriate payment rate of \$318 ( $\$476.98 \times 66 \frac{2}{3}\% = \$318$ ). Accordingly, the recalculation of the Award will utilize the correct payment rate of \$318.

<sup>3</sup> Because the ALJ used the incorrect payment in converting the sum paid for temporary partial disability compensation to weeks, that calculation was also incorrect.

<sup>4</sup> K.S.A. 1998 Supp. 44-510e(a)(1).

paid, except that the first 15 weeks of temporary total disability compensation is excluded. The remainder is then multiplied by the percentage of permanent partial general disability.<sup>5</sup>

As previously determined, the total sum paid as temporary partial disability compensation converted to 23.07 weeks. Excluding the first 15 weeks results in 8.07 weeks to subtract from 415 which leaves a remainder of 406.93. Multiplying that remainder by 24 percent results in 97.66 disability weeks payable.

The number of disability weeks payable are multiplied by the payment rate to determine the amount of the award.<sup>6</sup> Because of the mathematical errors in the ALJ's Award, it will be recalculated using the appropriate figures.

Respondent next requests a credit for a payment it made to Dr. Hughes for a scheduled examination which the claimant failed to attend. Simply stated, claimant testified that she was unaware of that appointment. Absent evidence claimant was apprised of the doctor's appointment, the respondent cannot request reimbursement for the missed appointment.

Lastly, respondent argues claimant is not entitled to future medical treatment because Dr. Hughes indicated there was no need for any additional treatment. This ignores Dr. Eyman's testimony that claimant needs additional antidepressant medication. Claimant is entitled to additional medical care upon proper application to the director.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated April 5, 2002, is modified to correct calculation errors in the award and affirmed in all other respects.

The claimant is entitled to the equivalent of 23.07 weeks of temporary total disability compensation at the rate of \$318 per week or \$7,336.26 followed by 97.66 weeks of permanent partial disability compensation at the rate of \$318 per week or \$31,055.88 for a 24 percent functional whole body disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

**IT IS SO ORDERED.**

---

<sup>5</sup> K.S.A. 1998 Supp. 44-510e(a)(2).

<sup>6</sup> K.S.A. 1998 Supp. 44-510e(a)(3).

Dated this \_\_\_\_\_ day of June 2003.

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant  
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier  
Brad E. Avery, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director